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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

ALBERT WOODS,

Petitioner,

v.

CITY OF CHICAGO,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTION PRESENTED

Does the reasonableness clause of the Fourth Amendment incorporate the common law rule prohibiting warrantless arrests in misdemeanor cases where the alleged offense had not been committed "in the presence of" the arresting officer?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 8, 2000.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-31) is reported at 234 F.3d 979. The opinion of the district court (App. 34-46) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 32) was entered on December 8, 2000. Rehearing was denied on May 30, 2001. (App. 33.)

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States.

STATEMENT

At about 12:00 noon on July 21, 1997, a man walked into a Chicago police station and told a desk officer that on July 18, 1997 petitioner had approached him with a lead pipe while threatening to kill him. (Appendix 29-30.) As a result of this complaint, two Chicago police officers arrested petitioner the next day on a charge of misdemeanor assault.[1] The officers did not have a warrant. (Appendix 19.)

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1. Illinois law defines assault as "conduct which places another in reasonable apprehension of receiving a battery," 720 ILCS 5/12-1, and makes the offense a "Class C misdemeanor" punishable by imprisonment of not more than 30 days. 730 ILCS 5/5-8-3.

After the criminal charge was dismissed, petitioner brought this civil rights action under 42 U.S.C. §1983 complaining that the officers had arrested him without probable cause and challenging the policy of the City of Chicago to authorize its police officers to make warrantless arrests for misdemeanor offenses that did not involve a breach of the peace and that had not occurred in the officer's presence. The district court concluded that the individual officers had acted with probable cause and granted summary judgment against petitioner on all of his claims. The Seventh Circuit affirmed.

The Court of Appeals addressed the merits of petitioner's claim against the City of Chicago, holding that the common law requirement that an offense be committed "in the presence of" the arresting officer was not part of the Fourth Amendment. (App. 19-31.)

In a petition for rehearing filed after this Court's decision in *Atwater v. City of Lago Vista,* No. 99-1408 (April 24, 2001)[2] petitioner argued that this case warranted further consideration on the "in the presence of" issue that the Court had reserved in footnote 11 in *Atwater.* The court of appeals denied rehearing without opinion. (App. 33.)

REASONS FOR GRANTING THE WRIT

In footnote 11 in *Atwater v. City of Lago Vista,* No. 99-1408 (April 24, 2001), the Court explicitly reserved the question presented in this case, i.e., whether the Fourth Amendment includes an "in the presence" requirement for misdemeanor arrests effected without a warrant.

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2. The Seventh Circuit enlarged the time for rehearing while *Atwater v. City of Lago Vista* was pending before this Court.

This question is squarely presented in this case: in its decision in this case, the Seventh Circuit resolved the "in the presence of" issue against petitioner, explicitly holding that the common law rule prohibiting warrantless arrests for misdemeanor offenses which were committed in the officer's presence is not part of the Fourth Amendment. (App. 19-31.)

The mode of analysis that the Court applied in *Atwater* compels the conclusion that the "in the presence of" limitation on an officer's power to make an arrest for a misdemeanor is part of the Fourth Amendment. Certiorari should be granted to review the decision of the Court of Appeals on this important issue.

1. HISTORICAL ANALYSIS

Atwater teaches that history is the starting point for analyzing plaintiff's contention that the Fourth Amendment includes an "in the presence of" requirement

At common law, an officer "was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence." *John Bad Elk v. United States,* 177 U.S. 529 (1900); *Carroll v. United States,* 267 U.S. 132, 156 (1925).

The common law rule is illustrated in *Coupey v. Henley,* 2 Esp. 540, 170 Eng.Rep. 448 (C.P.1797). There, one of the participants in a scuffle complained to the constables who "without any warrant or other authority" had arrested the plaintiff. The officers had not witnessed the incident. In directing a verdict for the plaintiff in a false arrest case, the Court stated as black letter law that "a constable is not warranted to take a person into custody for a mere assault, unless he is present at the time, and interposes with a view to prevent a breach of the peace."

Coupey is on all fours with this case. On July 21, 1997, a citizen walked into a Chicago police station and told a desk officer that he had been verbally assaulted by plaintiff three

days before. The next day, two Chicago police officers, acting without a warrant, arrested plaintiff at his place of employment. The officers did not witness any assault; nor did they act to prevent any breach of the peace. Under the rule applied in *Coupey,* plaintiff would be entitled to a directed verdict.

2. "IN THE PRESENCE OF" IS A BRIGHT LINE RULE

In *Atwater,* the Court stressed the importance of a bright line standard for Fourth Amendment rules. (slip op. 26-30.) The "in the presence of" is a bright line that requires that the officer be "apprised by any of his senses that a crime is being committed." Wilgus, *Arrest Without Warrant,* 22 Mich.L.Rev. 673, 680 (1924). The wrongdoing must be readily apparent to the officers. *Pickett v. State,* 99 Ga. 12, 25 S.E. 608, 609 (1896). The officers must see something that is "sufficiently indicative of a crime being in the course of commission," *People v. Moore,* 11 N.Y.2d 271, 272, 228 N.Y.S.2d 822, 823, 183 N.E.2d 225, 226 (1962); *United States v. Viale,* 312 F.2d 595, 600 (2d Cir. 1963).

3. THE COMMON-LAW REQUIREMENT OF "IN THE PRESENCE OF" HAS BEEN AFFORDED GREATER RESPECT THAN THE "BREACH OF THE PEACE" RULE

The Court observed in *Atwater* that "statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers without requiring any breach of the peace, as do a host of congressional enactments." (slip op. 23.) The same is not

true for the "in the presence of" requirement, which appears in at least 41 federal statutes.[3]

Of the original thirteen colonies, only New York has sought to authorize warrantless arrests for any offense, whether or not committed in the officer's presence. N.Y. Crim. Pro. Law §140.10 (McKinney 1997) permits an officer to make warrantless arrest for any offense "whether in his presence or otherwise."

Connecticut permits warrantless arrests for misdemeanors only when "the person arrested is taken or apprehended in the act or on the speedy information of others."[4] The "speedy information" provision prohibits a warrantless arrest 11 hours after the alleged offense. *State v. Carroll,* 131 Conn, 224, 38 A.2d 798 (1944).

Delaware limits warrantless arrests for misdemeanors committed out of the presence of the officer to offenses

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3. The statutes include 8 U.S.C. §1357, 16 U.S.C §3375, 16 U.S.C. §1172, 16 U.S.C. §1338, 16 U.S.C. §1377, 16 U.S.C. §1540, 16 U.S.C. §1861, 16 U.S.C. §1a-6, 16 U.S.C. §5506, 16 U.S.C. §559c, 16 U.S.C. §668(b), 16 U.S.C. §670j, 16 U.S.C. §690e, 16 U.S.C. §706, 16 U.S.C. §727, 16 U.S.C. §742j-1, 16 U.S.C. §831c-3, 16 U.S.C. §916(g), 16 U.S.C. §959, 16 U.S.C. §971f, 16 U.S.C. §972g, 18 U.S.C. §3052 18 U.S.C. §3056, 18 U.S.C. §3061, 18 U.S.C. §3063, 19 U.S.C. §1589a, 21 U.S.C. §372, 21 U.S.C. §878, 22 U.S.C. §1978, 22 U.S.C. §2709, 25 U.S.C. §2803, 26 U.S.C. §7608, 28 U.S.C. §566, 33 U.S.C. §452, 33 U.S.C. §466, 40 U.S.C. §212a, 40 U.S.C. §212a-2, 42 U.S.C. §2456a, 42 U.S.C. §7270a, 43 U.S.C. §1733, and 49 U.S.C. §44903.

4. Conn. General Statute §54-1f(a)

involving "physical injury or the threat thereof. . . illegal sexual contact or attempted sexual contact. . . violation of a protective order issued by Family Court; or . . . misdemeanor occurring on school property." 11 Del.Code Ann. §1904 (1997).

Georgia likewise has narrowly defined the situations in which an officer may make a warrantless arrest for a misdemeanor not committed in his (or her) presence. Ga.Code.Annot. §17-4-20 (1997) permits warrantless arrests in cases involving "family violence," physical abuse of a vulnerable adult, "or for other cause if there is likely to be failure of justice for want of a judicial officer to issue a warrant."

In Maryland, warrantless arrests are only permitted for offenses committed in the officer's presence or view. Md.Ann.Code of 1957, Art. 27, §594B.

With carefully enumerated exceptions for specific violations, Mass.Ann.Laws. ch. 90, §21, Massachusetts follows the common law rule, permitting a warrantless arrest for a nonfelony only when an offense is committed in the presence of the officer. *Commonwealth v. Conway,* 2 Mass.App.Ct. 547, 316 N.E.2d 757 (1974);

New Hampshire also enforces the "in the presence of" rule, but has created two exceptions: one for cases involving domestic violence and stalking, the other when the officer "has probable cause to believe that the person to be arrested has committed a misdemeanor or violation, and, if not immediately arrested, such person will not be apprehended, will destroy or conceal evidence of the offense, or will cause further personal injury or damage to property." N.H. Rev. Stat. Ann. §594:10 (1996)

New Jersey permits warrantless arrests for misdemeanors when the offense occurred "upon view" of the arresting officer. *State v. Vonderfecht,* 284 N.J.Super. 555,

557, 665 A.2d 1145, 1146 (1995).

North Carolina also retains the "in the presence of" requirement, with two statutory exceptions: when the offender "[w]ill not be apprehended unless immediately arrested, or may cause physical injury to himself or others, or damage to property unless immediately arrested." N.C. Gen. Stat. §15A-401 (1997).

Pennsylvania "has restricted the authority of police officers to make warrantless arrests for crimes not committed in their presence to a relatively narrow band of offenses." McCarthy, *Warrantless Arrests in Pennsylvania,* 92 Dick.L.Rev. 115, 130 (1987).

Rhode Island has abandoned a strict "in the presence of" requirement, *State v. Berker,* 120 R.I. 849, 855, 391 A.2d 107, 111 (1978) but permits warrantless misdemeanor arrests only when the officer "has reasonable ground to believe that person cannot be arrested later or may cause injury to himself or herself or others or loss or damage to property unless immediately arrested." R.I.Gen. Laws §12-7-3 (1996).

South Carolina authorizes warrantless arrests for offenses committed "in view," provided that the arrest is "made at the time of such violation of law or immediately thereafter." S.C. Code Ann. §17-13-30 (1997).

Virginia adheres to the "in the presence" of requirement for warrantless misdemeanor arrests. Va. Code Ann. 19.2-81 (1997. Many of the states without the common law history of the original colonies also adhere to an "in the presence of" requirement.

Idaho enforces the "in the presence of" requirement for warrantless misdemeanor arrests. *State v. Bowman,* 124 Idaho 936, 940, 866 P.2d 193, 197 (1994); Idaho Code § 19-603.

Ind.Code.Ann. §35-33-1-1 limits an officer's power to make arrests without a warrant in non-felony cases. With the exception of eleven enumerated misdemeanors,[5] and violations of a sentence of probation (Ind.Code.Ann. §35-50-7), Ind.Code.Ann. §35-33-1-1(4) prohibits warrantless arrests for misdemeanors unless the officer has "probable cause to believe the person is committing or attempting to commit a misdemeanor in the officer's presence."

Kansas expanded the "in the presence of" requirement in 1970, when it authorized warrantless misdemeanor arrests "in certain emergency situations." *State v. Flummerfelt,* 235 Kan. 609, 612, 684 P.2d 363, 366 (1984); Kan.Stat.Ann. 22-2401 (1997).

Montana permits a warrantless arrest when an offense is being committed in the officer's presence or when the officer reasonably believes that "the person has committed an offense and existing circumstances require immediate arrest." Mont. Code Anno. §46-6-311 (1997).

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5. Ind.Code.Ann. §9-26-1-1(1) (failure to stop at the scene of a motor vehicle accident that involved injury or death); Ind.Code.Ann. §9-26-1-1(2) (leaving the scene of a motor vehicle accident that resulted in injury or death); Ind.Code.Ann. §9-26-1-3 (failure to provide notice of a motor vehicle accident that resulted in injury or death); Ind.Code.Ann. §9-26-1-4 (failure to make a written report of a motor vehicle accident that resulted in injury or death); Ind.Code.Ann. §9-30-5 (operating a motor vehicle while intoxicated) Ind.Code.Ann. §35-46-1-15.1 (violation of order or protection); Ind.Code.Ann. §35-45-10 (stalking) Ind.Code.Ann. §35-47-2-22 (counterfeit handgun license); Ind.Code.Ann. §35-47-2-1 (carrying a handgun without a license)

In Nebraska, "without an exigent circumstance, a police officer may not arrest an individual for a misdemeanor unless it is committed in the officer's presence." *State v. Marcotte,* 233 Neb. 533, 537, 446 N.W.2d 228, 232 (1989). A Nebraska statute defines exigent circumstances as follows: "(a) will not be apprehended unless immediately arrested; (b) may cause injury to himself or others or damage to property unless immediately arrested; (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the officer." Neb.Rev.Stat. §29-404.02 (1997).

New Mexico adheres to an "in the presence of" requirement for warrantless misdemeanor arrests. *State v. Tywayne H.,* 123 N.M. 42, 933 P.2d 251, 257 (1997).

Nevada permits a warrantless arrest for any "public offense" committed in the officer's presence, and has relaxed the "in the presence of" requirement for "a felony or gross misdemeanor."[6] Nev.Rev.Stat. §171.124 (1997).

Oklahoma adheres to a strict "in the presence of" requirement for misdemeanor cases, with statutory exceptions for domestic abuse and driving while intoxicated. 22 Okl.St. §196; *Tomlin v. State,* 869 P.2d 334, 338 (1994).

In South Dakota, "an arrest for a misdemeanor must be made upon a warrant, unless committed in the presence of the arresting officer." *State v. Spry,* 87 S.D. 318, 327, 207

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6. Under Nevada law, a misdemeanor is punishable by imprisonment of not more than six months, or a fine of not more than one thousand dollars. Nev.Rev.Stat. §193.150. The penalties for a "gross misdemeanor" are imprisonment of up to one year or a fine of not more than two thousand dollars. Nev.Rev.Stat. §193.140.

N.W.2d 504, 509 (1973). The same rule is applied in North Dakota. *State v. Ritter,* 472 N.W.2d 444, 447 (North Dakota 1996); N.D.C.C. §29-06-15

Utah also adheres to the "in the presence of" requirement, *Salt Lake City v. Hanson,* 19 Utah 2d 32, 34, 425 P.2d 773, 774 (1967), with exceptions for carefully delineated emergency situations.[7]

Wyoming law is similar to that applied in Utah, requiring that the offense be committed "in the presence of" the arresting officer or that there be a predefined emergency situation, using the same list as in Utah. Wyo.Stat. §7-2-102 (Supp. 1994); Wyo.Stat. §31-5-1204(a); *Nellis v. Wyoming Department of Transportation,* 932 P.2d 741, 744 (Wyoming 1997).

West Virginia adheres to the "in the presence of" standard. *Simon v. West Virginia Department of Motor Vehicles,* 181 W.Va. 267, 268, 383 S.E.2d 320, 321 (1989); W.Va. Code §62-10-9 (1997).

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7. Utah Code Ann. §7707-2(3) provides for arrest without warrant when the officer:

> (3) . . . has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:
>
> (a) flee or conceal himself to avoid arrest;
>
> (b) destroy or conceal evidence of the commission of the offense; or
>
> (c) injure another person or damage property belonging to another person.

As set out above, the "in the presence of" limitation on an officer's power to make a warrantless arrest has been afforded far greater respect that the rule limiting arrests to actual breach of the peace.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

August, 2001

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-4069

ALBERT WOODS,

Plaintiff-Appellant,

v.

CITTY OF CHICAGO AND
CHICAGO POLICE OFFICERS
MAKOWSKI and MALANIS

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 98 CV 7092—**Charles R. Norgle** *Judge.*

Argued September 13, 2000—Decided December 8, 2000

Before Flaum, Chief Judge, and Bauer and Kanne, Circuit Judges.

BAUER, Circuit Judge.

Plaintiff-Appellant Albert Woods appeals from the order of the United States District Court for the Northern District of Illinois, Eastern Division, granting summary judgment to defendants-appellees Makowski, Alanis, and the City of Chicago. For the reasons set forth below, we affirm.

BACKGROUND

Albert Woods was arrested at his place of employment for misdemeanor assault. After the charges against him were dropped, Woods filed an action under 42 U.S.C. sec. 1983 against the City of Chicago and Chicago police officers Makowski and Alanis, asserting violations of his Fourth Amendment rights. In his complaint, Woods contended that

the officers acted unreasonably in arresting him without a warrant for misdemeanor assault one day after Gabriel Flores (the putative assault victim) signed a criminal complaint against him. He also asserted that the officers acted in accordance with a policy of the City of Chicago authorizing its police officers to make a full custodial arrest for a misdemeanor that did not involve a breach of the peace and that had not been committed in the officers' presence. The officers moved to dismiss Woods' complaint against them under Fed. R. Civ. P. 12(b)(6), arguing that Flores' report of the assault to the police (which Woods had referenced in his complaint) gave them probable cause to arrest Woods, and that arrests supported by probable cause are reasonable under the Fourth Amendment subject to a "rare exception" not applicable in Woods' case. The City moved to dismiss on similar grounds, arguing that even if Woods could show that the City had a municipal "policy" authorizing warrantless arrests for misdemeanors not involving a breach of the peace and not committed in an officer's presence, such a policy would not be unconstitutional as applied to Woods' arrest, which was authorized by state law and based on probable cause.

Woods filed a memorandum opposing the City's motion to dismiss, arguing that his complaint did not demonstrate that the officers had probable cause to arrest him. According to Woods, the complaint merely asserted that a citizen had walked into a Chicago police station on July 21, 1997 and stated that on July 18, 1997 he had been "verbally assaulted" by Woods. Woods noted that the complaint did not allege that this information was communicated to the arresting officers. Furthermore, he contended that even if the arresting officers had been aware of the citizen's complaint, it did not provide them with probable cause to arrest because "verbal assault" is not an offense under Illinois law.

The City and the individual defendants jointly filed a reply. Attached to the reply were various exhibits, including

a copy of Flores' verified misdemeanor complaint and a copy of the arresting officer's report of Woods' arrest. The verified misdemeanor complaint (signed under oath by Flores) charged Woods with aggravated assault, and stated that "on or about 18 July '97 . . . [Woods] while using a deadly weapon, length of a lead pipe, did without lawful authority produce weapon and came at victim yelling I'm going to kill you, which placed Gabriel Flores in reasonable apprehension of receiving a battery." The arrest report essentially repeated this account of the incident, stating that,

> [t]he above subject arrested for [a]ggravated assault. On 18 July 97 victim went to truck leasing company where offender is employed to gas up a leased truck. At that time offender got into a verbal arguement [sic] with victim and produced a lead pipe and told victim I'm going to kill you. When offender started to approach victim, victim got into his truck and fled the scene. R/O's interviewed victim who signed complainats [sic], R/O's went to offender's place of employment, placed subject under arrest and advised subject of his rights which he stated he understood.

The arrest report was signed under the statement "I do solemnly, sincerely, and truly declare and affirm that the facts stated herein are accurate to the best of my knowledge."

Woods moved to exclude these exhibits on grounds that such evidentiary material could not be considered during a motion to dismiss. He argued that the court could not consider the exhibits unless it first converted the motion to dismiss into a motion for summary judgment under Fed. R. Civ. P. 12(b), and that such a conversion would be inappropriate in this case. Finally, he argued that unless the court excluded these materials, it must give Woods an opportunity to respond, and that in order to do so Woods must be allowed to depose the officers who signed the arrest report

"about the report and about the circumstances of the signing of the complaint" as well as "the citizen upon whose alleged complaint plaintiff was arrested." The court granted Woods' motion to exclude the exhibits. Subsequently, the court granted the City's motion to dismiss on the ground that Woods had failed to state a municipal policy, and it gave Woods leave to file an amended complaint.

Woods filed an amended complaint which restated his earlier claim that Flores claimed to have been "verbally assaulted" by Woods, and which explicitly stated that such a claim did not supply the officers with probable cause to arrest Woods. The amended complaint also reasserted that the officers violated Woods' Fourth Amendment rights by arresting him without a warrant for a misdemeanor offense not commited in their presence and not involving a breach of the peace pursuant to a municipal policy authorizing such arrests. Again, the defendants moved to dismiss, arguing that Flores' complaint established probable cause.[1] Woods opposed the defendants' motion, again contending that even if the officers had been aware of Flores' complaint (which his complaint did not allege), that complaint did not provide probable cause to arrest because "verbal assault" is not an offense under Illinois law, which defines assault as "conduct which places another in reasonable apprehension of receiving a battery." 720 ILCS 5/12-1.

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1. The defendants also asserted the defense of qualified immunity and argued that Woods failed to establish a causal connection between the alleged municipal policy and his claimed injury. However, the district court did not address these issues, and they are not at issue in this appeal.

The court then converted the defendants' motion to dismiss into a motion for summary judgment, noting that the defendants had attached "pertinent evidentiary material" to their reply to Woods' memorandum in opposition to the motion to dismiss Woods' original complaint. Addressing Woods' claim that Flores had complained merely of a "verbal assault," the court quoted the arrest report's account of Flores' complaint, which stated that Woods had brandished a lead pipe during the altercation and which specifically referenced Illinois' aggravated assault statute. The court stated that "the misdemeanor complaint, filed by Gabriel Flores, further indicates that Woods committed an aggravated assault with a deadly weapon while threatening to kill Flores," and that "this evidence indicates that thearresting officers arrested Woods based on information that Woods committed an aggravated assault." In ordering Woods to respond to the motion for summary judgment, the court admonished him to "pay particular attention" to Fed. R. Civ. P. 11(b), and stated that: "Woods' characterization of the altercation as a Further, his argument that 'nowhere in the complaint does plaintiff allege that any police officer had been informed that plaintiff had engaged in conduct which placed another in reasonable apprehension of receiving a battery' . . . ignores facts and logic in a blatant attempt to survive the motion [to] dismiss."

In Woods' response, he argued that the arrest report and the misdemeanor complaint could not be considered on a motion for summary judgment because: (1) the defendants had not laid any foundation for their admission, (for example, they did not show the date or time of the alleged interview between Flores and the arresting officers in the arrest report); (2) they were unauthenticated; and (3) the police report did not fully and fairly set out the facts. In support of the latter argument, Woods attached a Chicago Police Case Report to his response, which he relied upon for its accuracy. The case report stated that "R/O interviewed the victim who related to

R/O that . . . offender . . . grabbed lead pipe—told victim to get out of the truck and said kill you.' Victim left thinking offender overreacting. Today's date 21 Dec. '97 offender told two of victim's co-workers (Kenny and Mike) that he was going to Victim given victim information sheet. R/O advised warrant.'' Woods argued that the case report demonstrated that the police lacked probable cause to arrest him because it showed that Flores waited three days to report the incident and told the police that he left thinking Woods was ''overreacting,'' and because Flores' account of the incident showed only that Woods had ''verbally assaulted'' Flores, not that he had placed Flores in reasonable apprehension of receiving a battery. Woods also noted that the police had no documentation showing that they investigated Flores' complaint or made any effort to corroborate it (e.g. by speaking to Flores' supervisor or to either of the two coworkers who allegedly heard Woods' renewed threat to ''get'' Flores.) Woods asked the district court to vacate its order converting the motion to dismiss into a motion for summary judgment, and in the alternative, to postpone ruling on the motion until Woods had a chance to depose Flores and the officers who signed and prepared the arrest report.

In ruling on the summary judgment motion, the district court found that it could properly consider the police report and the misdemeanor complaint. Responding to Woods' objection that the documents were not authenticated, the court held that the documents were ''credible and trustworthy'' because they were sworn to under oath by the officers and by Flores, and because they were business records kept by the police department. Additionally, the court found that Woods had admitted to the accuracy of the complaint and the arrest report by attaching and relying on the case report, which corroborated the account given by the complaint and the arrest report. The court also noted that it was examining the records ''not for their truth, but for what the officers knew when they arrested Woods.''

Upon considering the exhibits, the court concluded that they showed that the officers had arrested Woods believing that he had threatened to kill Flores with a lead pipe, and that this alone established probable cause. In response to Woods' discovery request, the court noted that it had given Woods the opportunity to show why it should not accept the information in the complaint and the arrest report as credible, and that he had failed to do so (indeed, he had even corroborated the documents by submitting the case report). Moreover, the court found that Woods had offered absolutely no evidence that the documents were "fraudulent, signed by mistake, or even inaccurate," nor had he even denied that he had threatened to kill Flores while approaching him with a lead pipe. Under the circumstances, the court found that depositions would be a waste of time, and it granted summary judgment for the defendants without allowing Woods to depose Flores or the officers who signed the arrest report. This appeal followed.

DISCUSSION

I. Procedural Issues

Woods argues that, in deciding the converted motion for summary judgment, the district court improperly considered the verified misdemeanor complaint and the arrest report. He also argues that the district court abused its discretion in ruling on the motion without allowing him to depose Flores and the officers who prepared and signed the arrest report.

A district court may properly grant summary judgment when "the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Whetstine v. Gates Rubber Co.*, 895 F.2d 388, 391-92 (7th Cir. 1990) (citation omitted). The moving party has the burden of establishing the lack of such an issue. *See id.* at 392 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

We review a district court's grant of summary judgment de novo, drawing all reasonable inferences from the record in the light most favorable to the nonmovant.

As a preliminary matter, we note that the court did nothing improper in converting the defendants' motion to dismiss into a motion for summary judgment. Under Fed. R. Civ. P. 12(b), a district court must make such a conversion when matters outside of the complaint are presented and not excluded by the court. Here, the district court initially granted Woods' motion to strike the defendants' exhibits, and ruled on the initial motion to dismiss without considering the exhibits or anything outside of the pleadings. Then, after Woods filed an amended complaint and the defendants moved again to dismiss, the court reconsidered the previously stricken exhibits and treated the defendants' new motion to dismiss as a motion for summary judgment. Woods cites no cases that suggest that a district court may not consider previously stricken exhibits in ruling on a converted motion for summary judgment, and we find that the district court acted properly in doing so here.

However, Woods argues that the district court erred in considering the arrest report and the misdemeanor complaint in deciding the summary judgment motion because the reports contained inadmissible hearsay, and because the documents were not "affidavits" under Fed. R. Civ. P. 56(e) and 28 U.S.C. sec. 1746. He also argues that the district court abused its discretion in ruling on the summary judgment motion before giving him leave to depose Flores and the officers who signed and prepared the arrest report. We address these arguments in turn.

A. Woods' Hearsay Argument

Woods argues that the arrest report and the misdemeanor complaint contained inadmissible hearsay, and therefore could not properly be considered on a motion for summary judgment. The district court found that the information in these documents was credible and trustworthy

under Fed. R. Evid. 803(6) because they were sworn to under oath by the officers and by Flores, and because they were business records kept by the police department. Woods concedes that portions of police reports that contain information prepared by the business are admissible as business records. For example, Woods suggests that a properly authenticated police report would be admissible to show the date and time of the arrest and the date and time that the arrestee was released on bond. However, Woods notes that "the business records exception does not embrace statements contained within a business record that were made by one who is not a part of the business if the embraced statements are offered for their truth." *United States v. Vigneau,* 187 F.3d 70, 75 (1st Cir. 1999). In other words, Woods argues that statements made by third parties in an otherwise admissible business record cannot properly be admitted for their truth unless they can be shown independently to fall within a recognized hearsay exception.

While we agree fully with this principle of law, we find that it is not implicated in this case and is of no help to Woods. As the district court noted, the defendants offered the statements in the arrest report and the verified criminal complaint describing the details of the alleged altercation between Woods and Flores not for their truth, but to show the effect that the statements had on the officers. Because the officers asserted the defense of qualified immunity, Woods had the burden at trial to prove that the police lacked probable cause to arrest him. *See Sorenson v. Ferrie,* 134 F.3d 325, 330 (5th Cir. 1998); *see generally Eversole v. Steele,* 59 F.3d 710, 717-18 (7th Cir. 1995). The determination of whether an arresting officer has probable cause to arrest an alleged offender turns on whether a reasonable person in the officer's position would have probable cause to believe that an offense has been committed. This inquiry, in turn, depends upon whether the facts and circumstances communicated to the arresting officer at the time of the arrest

would warrant a reasonable officer in holding such a belief. The defendants correctly note that "so long as a reasonably credible witness or victim informs the police that someone has committed . . . a crime, the officers have probable cause to place the alleged culprit under arrest . . ." *Jenkins v. Keating,* 147 F.3d 577, 585 (7th Cir. 1998), and that once such a reasonably credible complaint has been made, the existence of probable cause to arrest does not depend upon the actual truth of the complaint. *See Kelley v. Myler,* 149 F.3d 641, 647 (7th Cir. 1998) ("Probable cause does not depend on the witness turning out to have been right; it's what the police know, not whether they know the truth that matters."). In this case, the defendants offered the information conveyed to the police by Flores and memorialized in the misdemeanor complaint and arrest report not to show that Woods had actually performed the conduct as reported in those documents, but rather to show that they had probable cause to arrest Woods based upon the information communicated to them by Flores. The district court considered the statements strictly to determine the effect that they would have upon the arresting officers when communicated to them by a presumptively reliable citizen. Thus, the district court did not run afoul of the prohibition on hearsay by considering these documents for this limited purpose.

B. Woods' "affidavit" argument

Woods also argues that the district court should not have considered the arrest report and the misdemeanor complaint because they did not qualify as admissible "affidavits" under 28 U.S.C. sec. 1746 and Fed. R. Civ. P. 56(e). Rule 56(e) authorizes parties to submit affidavits supporting or opposing a motion for summary judgment, but it specifically mandates that such affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Moreover, 28 U.S.C. sec. 1746 provides, in relevant part, that "[w]herever, under any law of the United States or under any rule . . . made

pursuant to law, any matter is required or permitted to be supported . . . by . force and effect, be supported . . . by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury . . ." (emphasis added). Woods contends that the misdemeanor complaint and the arrest report were not "affidavits" as contemplated by 28 U.S.C. sec. 1746 because, while they were purportedly sworn by Flores and officer Makowski (respectively), neither document contained the "penalty of perjury" language as required by that section. Moreover, Woods maintains that even if officer Makowski's signed declaration on the arrest report were sufficient to transform that document into an "affidavit," the report would still be inadmissible under Fed. R. Civ. P. 56(e) because it contained statements made by Flores regarding matters not within Makowski's personal knowledge.

Woods' arguments are unpersuasive. First, while Fed. R. Civ. P. 56(e) allows a party to submit affidavits in support of its summary judgment motion, it does not require that all supporting material be submitted in affidavit form. See Fed. R. Civ. P. 56(b) (permitting a party to move for summary judgment "with or without supporting affidavits"); Celotex, 477 U.S. at 323 (1986). Sworn testimony is not the only basis on which summary judgment may be granted; rather, "'the court may consider any material that would be admissible or usable at trial,'" *Aguilera v. Cook County Police & Corrs. Merit Bd.*, 760 F.2d 844, 849 (7th Cir. 1985) (citation omitted), including properly authenticated and admissible documents or exhibits. *See Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985). Therefore, the district court was entitled to consider the arrest report and the misdemeanor complaint even if they were not admissible as "affidavits," under 28 U.S.C. sec. 1746 or Fed. R. Civ. P. 56(e), so long as those documents were properly authenticated and were otherwise admissible.

The district court found the documents admissible as a business record under Fed. R. Evid. 803(6). To be admissible as a business record, a document must have sufficient indicia of trustworthiness to be considered reliable. *See Saks Int'l, Inc. v. M/V "Export Champion,"* 817 F.2d 1011, 1013 (2d Cir. 1987). Normally, to demonstrate such trustworthiness and reliability at the summary judgment stage, the party seeking to offer the business record must attach an affidavit sworn to by a person who would be qualified to introduce the record as evidence at trial, for example, a custodian or anyone qualified to speak from personal knowledge that the documents were admissible business records. *See Federal Deposit Ins. Corp. v. Patel,* 46 F.3d 482, 484 (5th Cir. 1995); see also Martz, 757 F.2d at 138 ("When a party seeks to offer evidence through other exhibits, they must be identified by affidavit or otherwise made admissible in evidence."). However, under the rather peculiar circumstances of this case, we feel that the district court did not abuse its discretion in admitting the arrest report and the misdemeanor complaint as business records without requiring the defendants to authenticate them by affidavit.

Woods attached a Chicago Police Case Report to his response to the defendants' motion for summary judgment, and he relied on the case report for its accuracy both in his original response before the district court and in his appellate brief presented to this Court. The case report recapitulated Flores' account of the altercation as presented in the arrest report and the misdemeanor complaint in each of its essential details. By submitting and relying upon the case report, Woods conceded the accuracy of the documents that the defendants sought to introduce. This situation is strikingly similar to the situation that the First Circuit confronted in *Cerqueira v. Cerqueira,* 828 F.2d 863 (1st Cir. 1987). In that case, the plaintiff sued the legal titleholder to a fishing boat, seeking recovery for injuries he sustained while he was working on the boat. The defendant moved for summary

judgment on the grounds that he was not the owner of the boat and was therefore not liable for the plaintiff's injuries. The defendant tried to show that he was not the owner of the boat by, *inter alia,* attaching an exhibit to his legal memorandum supporting his motion for summary judgment. The exhibit was purportedly an unsigned draft of an agreement between the parties prepared by the plaintiff's lawyer for use in an earlier case between them, and it showed that the plaintiff had bought the boat and that the defendant held title for the plaintiff because the plaintiff was not a U.S. citizen. In his appellate brief, the plaintiff conceded that he had drafted the document as a proposed resolution of the earlier case. While the court noted that "technically speaking, [the defendant] should have introduced his exhibits into the record through affidavits, not as exhibits to a memorandum of law . . .," it held that given the plaintiff's concession, it was appropriate for the district court to have considered the exhibit in ruling on the motion for summary judgment. Id. at 865. The court reasoned that there was "no point in remanding this case to permit [the defendant] to file an affidavit stating the very thing that [the plaintiff] has conceded, namely, that the document is what it purports to be." Id.

We find this reasoning persuasive and applicable to the facts of this case. By submitting the case report and relying on it, Woods has conceded that Flores made out a complaint against him to the Chicago Police, and that in that complaint Flores alleged that Woods had threatened to kill him while wielding a lead pipe. Since these are exactly the facts that the defendants sought to prove through the arrest report and the misdemeanor complaint, we conclude that Woods cannot reasonably question the reliability of those documents. Requiring authenticating affidavits in this case would be an empty formality, and the district court did not abuse its discretion when it considered the documents without such affidavits.

Moreover, even were we to hold that the district court erred in considering the arrest report and misdemeanor complaint absent a certifying affidavit or some other traditional method of authentication, such an error would be harmless in this case. Rule 56(c) provides that summary judgment shall be granted if, among other documents, "[the] admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." An "admission" includes "anything which is in practical fact an admission" *Cerqueira,* 828 F.2d at 865 (citation omitted), including statements made in a brief presented to the district court, *see United States v. One Heckler-Koch Rifle,* 629 F.2d 1250, 1253 (7th Cir. 1980). Woods submitted the case report to the district court, and he relied on its account of the complaint that Flores gave to the police in his response to the defendants' summary judgment motion. As a practical matter, this amounted to an admission of the facts presented in the case report, and the district court was entitled to consider the facts admitted in ruling on the defendants' summary judgment motion. By continuing to rely on the case report and subsequently failing to offer any evidence to rebut its account of Flores' complaint, Woods left the district court free to grant summary judgment upon consideration of the facts admitted by Woods alone and without even considering the arrest report or the misdemeanor complaint. Thus, even if the latter documents were inadmissible and therefore not available for the district court's consideration, the court could still properly have granted summary judgment for the defendants. *See In re Sunset Bay Assocs. v. Eureka Fed. Sav. & Loan Ass'n,* 944 F.2d 1503, 1513-14 (9th Cir. 1991) (holding that, once a party had admitted that the opposing party's unauthenticated exhibit contains truthful information, the court may consider the material in that exhibit because "an admission is, or course, admissible in evidence"). In his reply brief, Woods tries to avoid having some of the damaging information in the case report admitted against him (in particular, the case

report's statement that the "R/O's interviewed the victim") by asserting that the case report itself is unverified and lacks the "basic foundation predicates of date, time, place, and persons present." However, while unauthenticated documents generally cannot be considered on a motion for summary judgment, a party who submits such a document without reservation cannot subsequently complain because the district court considered the contents of the document. *See Walker v. Wayne County, Iowa,* 850 F.2d 433, 435 (8th Cir. 1988).

C. Woods' discovery request

Woods also argues that the district court "applied an erroneous legal standard" in refusing to permit him to depose Flores and the arresting officers before ruling on the defendants' summary judgment motion. Citing *Illinois State Employees Union v. Lewis,* 473 F.2d 561 (7th Cir. 1973), Woods maintains that summary judgment should not be entered "until the party opposing the motion has had a fair opportunity to conduct such discovery as may be necessary to meet the factual basis for the motion." *See Celotex,* 477 U.S. at 326 (1986). Woods contends that the district court erroneously denied him this opportunity, and that its "sua sponte" decision to enter summary judgment was unfair and premature. Woods' argument is unconvincing.

A district court's decision to consider a defendant's motion for summary judgment before allowing the plaintiff to depose certain witness is a discovery matter which we review for abuse of discretion. *Doty v. Illinois Central R.R. Co.,* 162 F.3d 460, 461 (7th Cir. 1998). Rule 56(f) authorizes a district court to refuse to grant a motion for summary judgment or to continue its ruling on such a motion pending further discovery if the nonmovant submits an affidavit demonstrating why it cannot yet present facts sufficient to justify its opposition to the motion. Fed. R. Civ. P. 56(f). While Woods did ask the district court to postpone its ruling until he could depose Flores and the officers, he did not file an affidavit outlining his reasons for needing further

discovery as contemplated by Rule 56(f). This alone justifies affirmance of the district court's decision. *See Wallace v. Tilley,* 41 F.3d 296, 302-03 (7th Cir. 1994) (holding that the court was precluded from considering whether the district court had abused its discretion in ruling on defendant's summary judgment motion before allowing plaintiff to conduct requested discovery where the plaintiff had not filed an affidavit pursuant to rule 56(f), and stating that "'when a party does not avail himself of relief under Rule 56(f), it is generally not an abuse of discretion for the district court to rule on the motion for summary judgment'" (citation omitted)); *see also Jones v. Merchants Nat'l Bank & Trust Company of Indianapolis,* 42 F.3d 1054, 1060 (7th Cir. 1994); *Kinney v. Indiana Youth Ctr.,* 950 F.2d 462, 466 (7th Cir. 1991); *Boling v. Romer,* 101 F.3d 1336, 1339 n.3 (10th Cir. 1996); *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.,* 769 F.2d 919, 926 (2d Cir. 1985) (collecting cases); *see also Committee for the First Amendment v. Campbell,* 962 F.2d 1517, 1522 (10th Cir. 1992) (ruling that unverified statements in an attorney's memoranda of law alleging a need for a continuance on a motion for summary judgment pending further discovery were insufficient as grounds for a continuance under Rule 56(f), and stating that "[a]dvocacy by counsel does not suffice for evidence or fact in the Rule 56(f) context.") (citation omitted).

Further, even if we were to waive Rule 56(f)'s affidavit requirement in this case, we would still find that the district court did not abuse its discretion in ruling on the motion before granting Woods leave to depose Flores and the arresting officers. Woods offered virtually nothing to demonstrate why the depositions that he sought were likely to generate any genuine issue of material fact. Woods never denied that Flores complained to the Chicago police that Woods had approached him with a lead pipe while threatening to kill

him (indeed, his submission of and reliance upon the case report precluded him from denying this).[2] This admission alone would be enough to establish that the arresting officers had probable cause to arrest Woods (thereby entitling the officers to summary judgment on Woods' sec. 1983 claims), absent some evidence showing that it should have been apparent to the officers that Flores was incredible as a matter of law and that the officers acted unreasonably in relying on his complaint. Woods never put forward any such evidence, nor did he explain why discovery was likely to unearth it. Instead, Woods merely pointed to a sentence in the case report which indicated that Flores told the police that he had left the scene of the altercation with Woods thinking that Woods was "overreacting," suggesting that this establishes that the officers should not have relied on Flores' account of the incident when arresting Woods.[3] However, Flores'

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2. Woods did contend that there was no evidence that Flores' complaint was communicated to the particular officers who arrested him, but given that the case report opened its narration of Flores' complaint with the statement that "R/O interviewed victim who related to R/O that. . . . " this argument is at worse disingenuous, and is at best pure sophistry.

3. Woods also pointed to Flores' delay in reporting the incident as a possible ground for the police to doubt his credibility. However, as the case report indicates, Flores provided the police with a credible explanation for the delay—namely, the renewed threat that Woods had communicated to Flores' co-workers on the day that he reported the incident. Woods does not deny that Flores gave this explanation, nor does he suggest why it might have been incredible.

comment that he thought that Woods was "overreacting" is completely irrelevant to the material facts that Woods needed to contest to defeat summary judgment; it tends to show neither that Flores did not report Woods' assault to the police, nor that Flores' account of the assault was in any way incredible. At best it shows merely that Flores thought that Woods was "overreacting" when he assaulted Flores, not that Flores was overreacting by reporting a crime to the police. Thus, based upon the facts that Woods presented to the district court, any claim that Flores was incredible as a matter of law and that the officers should not have relied upon his complaint would have been pure speculation. This is far too slender a reed upon which to hang a discovery request. *See generally United States v. All Assets and Equip. of West Side Bldg. Corp.*, 58 F.3d 1181, 1190 (7th Cir. 1995).

Indeed, under the circumstances of this case, we would most likely affirm even if the district court had converted the defendants' motion to dismiss into a motion for summary judgment and granted the motion without giving Woods any notice of the conversion or any opportunity to respond to the summary judgment motion. While the conversion of a 12(b)(6) motion into a summary judgment motion "should be accompanied by prior notice and 'a reasonable opportunity to establish the existence of material controverted facts,'" the failure to afford such procedure will not necessarily mandate reversal unless "the record discloses the existence of unresolved material fact issues," or "the parties represent that they would have submitted specific controverted material factual issues to the trial court if they had been given the opportunity." *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 391 (7th Cir. 1981) (citation omitted). As has been noted, Woods did not present anything that would create a genuine issue of material fact, nor did he point to any specific controverted factual issue that he would be able to present after conducting depositions. Thus,

the court could have granted the converted motion against Woods without notice. The fact that the court gave Woods notice and ample opportunity to respond and Woods still failed to raise any genuine issue of material fact only strengthens our conclusion that the district court did not abuse its discretion when it granted the motion without allowing Woods to depose Flores or the officers.

II. Fourth Amendment Issue

Woods argues that his warrantless arrest for misdemeanor assault was unconstitutional because the alleged assault did not involve a breach of the peace and did not occur in the presence of the arresting officers. Woods notes that the Supreme Court has recently stated that "[i]n determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." *Wyoming v. Houghton,* 526 U.S. 295, 299 (1999). The common law in existence at the time of the framing of the Fourth Amendment prohibited a peace officer from making a warrantless arrest for a misdemeanor unless the misdemeanor was committed in the presence of the arresting officer and involved a breach of the peace. *See United States v. Watson,* 423 U.S. 411, 418 (1976); *Carroll v. United States,* 267 U.S. 132, 156-57 (1925); *Bad Elk v. United States,* 177 U.S. 529, 534-35 (1900). Relying on *Houghton,* Woods maintains that the common law rule controls the Fourth Amendment inquiry in this case, and that therefore his warrantless arrest for a misdemeanor not committed in the presence of the arresting officers violates the Amendment. Woods further argues that the Chicago "municipal policy" which authorized his arrest is unconstitutional insofar as it abrogates the common law rule. We are not persuaded.

The Supreme Court has never held that a police officer violates the Fourth Amendment merely by arresting someone without a warrant for a misdemeanor offense which did not

occur in the officer's presence and/or did not involve a breach of the peace. Rather, when determining the constitutionality of a warrantless arrest for a criminal offense, the Court has repeatedly focused its inquiry on the existence of probable cause for the arrest. *See, e.g., Gerstein v. Pugh,* 420 U.S. 103, 111-12 (1975). While "the Court has expressed a preference for the use of arrest warrants when feasible," Gerstein, 420 U.S. at 113, the Court has never elevated this judicial preference to a per se rule mandating warrants for all arrests irrespective of the existence of probable cause. *See, e.g., Watson,* 423 U.S. at 417 (stating that "'such a requirement would constitute an intolerable handicap for legitimate law enforcement'" (citation omitted)). Indeed, in *Gerstein,* the court noted that it "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant," 420 U.S. at 113, and in the intervening years since Gerstein it has strayed from this principle only once, when it imposed a warrant requirement for arrests made in a suspect's home. *See Payton v. New York,* 445 U.S. 573, 585-86, 589-90 (1980) (holding that, absent exigent circumstances, the Fourth Amendment prohibits warrantless, nonconsensual entry into a suspect's home in order to make a felony arrest—notwithstanding the existence of probable cause to arrest). Moreover, in *Payton* the Court justified its departure from the usual rule by emphasizing that the Fourth Amendment affords citizens special protections against government intrusions into their homes, stating that "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed'" (quoting *United States v. United States District Court,* 407 U.S. 297, 313 (1972)) and that the language of the Fourth Amendment "unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" Id. at 589-90 (citation omitted). No authorities cited by either of the parties to this appeal, nor any that we have found,

expressly require the police to obtain an arrest warrant before lawfully arresting a subject whom they have probable cause to believe has committed an offense in any instance other than an arrest in a suspect's home.[4] Indeed, we have concluded otherwise. *See, e.g., United States v. Fernandez-Guzman,* 577 F.2d 1093, 1097 (7th Cir. 1978) ("[I]n the area of arrests made in a public place, an arrest warrant has never been considered to be constitutionally mandated even when there was opportunity for one to be obtained.") (citing *Watson,* 423 U.S. 411 (1976)). Because Woods was not arrested in his home, he cannot avail himself of Payton's holding, and under the inquiry traditionally applied by the Supreme Court, his arrest would not violate the Fourth Amendment unless the arresting officers lacked probable cause.

However, Woods argues that the historical analysis employed by the Court in Houghton changed the traditional Fourth Amendment inquiry and imposed a warrant requirement for all routine misdemeanor arrests unless the misdemeanor is committed in the presence of the arresting officer and involved a breach of the peace. Unfortunately for Woods, however, Houghton did not constitutionalize the common law rules regarding misdemeanor arrests, nor did it even address the reasonableness of an arrest under the Fourth Amendment. Houghton addressed the reasonableness of a search, not of a seizure of the person, and it held merely that "police officers with probable cause to search a car may

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4. In *Maryland v. Macon,* which was decided five years after Payton, the Court expressly reserved the question of whether the Fourth Amendment prohibits a warrantless arrest outside of the home for the state law misdemeanor of distribution of obscene materials. *See* 472 U.S. 463, 471 (1985).

inspect passengers' belongings found in the car that are capable of concealing the object of the search." 526 U.S. at 307. Moreover, neither of the cases cited by Houghton as authority for its historical analysis held that the common law rules governing misdemeanor arrests controls the inquiry into the "reasonableness" of a misdemeanor arrest under the Fourth Amendment. *California v. Hodari D.* looked to the common law to determine the meaning of "seizure" under the Fourth Amendment, not to determine whether a given seizure was reasonable under the Amendment. See 499 U.S. 621, 624-29 (1991). *Wilson v. Arkansas* ruled that the common law "knock and announce" rule forms a part of the Fourth Amendment reasonableness inquiry, and that the reasonableness of a search of a dwelling "may depend in part on whether law enforcement officers announced their presence and authority prior to entering." 514 U.S. 927, 931 (1995) (emphasis added). Indeed, in *Wilson,* the Court was careful not to reduce the reasonableness inquiry to any inflexible, per se rule, noting that "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," and holding that "although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." Id. at 934. Thus, neither *Houghton* nor the cases it relied upon directly support Woods' argument.

Moreover, in a case that was decided after both *Hodari* and *Wilson,* the Court strongly and unequivocally affirmed its traditional view that, absent certain extraordinary circumstances, a seizure is reasonable under the Fourth Amendment when it is based upon probable cause regardless of the severity of the offense involved. *See Whren v. United States,* 517 U.S. 806, 817-18 (1996). In *Whren,* the Court held that a traffic stop of a motorist by plainclothes policemen in an

unmarked car did not violate the Fourth Amendment where the officers had probable cause to believe that the motorist committed a traffic violation. The motorist argued that the stop was unreasonable because the law enforcement interests in investigating minor traffic offenses were minimal and were outweighed by the individual motorist's right to be free from such intrusions. In rejecting this reasoning, the Court stated that while it is true in principle that the reasonableness inquiry always involves a balancing of all relevant factors, "[w]ith rare exceptions . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause." Id. at 817. The Court noted that "[w]here probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body." Id. at 818 (citations omitted). After concluding that the traffic stop at issue did not "remotely qualify" as any such extreme practice, the Court held that it was "governed by the usual rule that probable cause to believe the law has been broken avoiding police contact." Id. Whren did not directly address the question presented here since it involved a temporary traffic detention and not a full custodial arrest, and since it did not address the relationship between the Fourth Amendment and the common law arrest rules. However, Whren's unequivocally stated rationale flatly contradicts Woods' assertion that certain warrantless non-felony arrests violate the Fourth Amendment even if they are based upon probable cause, and it undermines any claim that the reasonableness of a seizure under the Fourth Amendment depends

entirely upon whether the offense is classified as a felony or as a misdemeanor.[5]

In addition, while we have never decided whether the Fourth Amendment incorporates the common law "in the presence" rule for misdemeanor arrests,[6] we have held that other aspects of the common law standards of misdemeanor arrests are not part of the Fourth Amendment's prohibition of "unreasonable" searches and seizures. In *Ricci v. Arlington Heights, Illinois,* the plaintiff brought a sec. 1983 action against the Village of Arlington Heights and the police officers who had arrested him, arguing that a full custodial arrest for the fine-only misdemeanor offense of operating a business without a license violated the Fourth Amendment. See 116 F.3d 288, 288 (7th Cir. 1997). The plaintiff did not dispute that the officers had probable cause to believe that he was violating the ordinance. See id. at 290. However, the plaintiff argued that the misdemeanor offense for which he was arrested did not involve a breach of the peace, and that because the common law prohibited custodial arrests for such offenses, his arrest was unreasonable under the Fourth

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5. Furthermore, even after *Houghton,* courts have continued to apply the traditional "probable cause" standard that was reaffirmed in Whren in determining the reasonableness of an arrest. *See, e.g., United States v. Moore,* 215 F.3d 681, 685 (7th Cir. 2000); *Wooley v. City of Baton Rouge,* 211 F.3d 913, 925 (5th Cir. 2000).

6. In *Gramenos v. Jewel Cos., Inc.,* we reserved the question of whether a state statute abrogating the common law "in the presence" rule for misdemeanor arrests "without putting equivalent guarantees of reasonable conduct in its place" comports with the Fourth Amendment. 797 F.2d 432, 441 (7th Cir. 1986).

Amendment. We declined to read the literal strictures of the common law rule into the Fourth Amendment, and we upheld the plaintiff's arrest on Fourth Amendment grounds, noting that "the common law rule has been relaxed to include arrests for offenses other than breaches of the peace." Id. at 291 (citations omitted). Woods correctly notes that *Ricci* is distinguishable from his case in some key respects, because Ricci (unlike Woods) committed his offense in the presence of the arresting officers, and because *Ricci* did not directly address the question of whether and under what circumstances a warrant is constitutionally required for a non-felony arrest.[7] However, the fact remains that we upheld a warrantless arrest in *Ricci* which would not have been permitted under framing-era common law, and in doing so we rejected the argument that the strict terms of the common law rule control the inquiry into the constitutionality of a misdemeanor arrest. Thus, while *Ricci* does not definitively refute Woods' argument, it directly undermines his major premise.

Moreover, several of our sister circuits have squarely addressed Woods' argument, and they have uniformly held or stated that the common law "in the presence" rule is not part of the Fourth Amendment. *See Vargas-Badillo v. Diaz-Torres,* 114 F.3d 3, 6 (1st Cir. 1997) (upholding a grant of summary judgment for defendant police officer on a sec. 1983 claim alleging illegal arrest, and stating that "[t]o date, neither the Supreme Court nor this circuit ever has held that the Fourth Amendment prohibits warrantless arrests for misdemeanors not committed in the presence of arresting

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7. As Woods notes, in *Ricci* we held that the plaintiff had waived any argument under the warrant clause. See id. at 292.

officers''); *United States v. Smith,* 73 F.3d 1414, 1416 (6th Cir. 1996) (stating that the requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest ''is not mandated by the Fourth Amendment; it is merely a rule of the common law''); *Pyles v. Raisor,* 60 F.3d 1211, 1215 (6th Cir. 1995) (rejecting a Fourth Amendment challenge to a misdemeanor arrest when probable cause existed, and holding that the plaintiff's ''right as an alleged misdemeanant to be arrested only when the misdemeanor is committed in the presence of the arresting officer [is] not grounded in the federal Constitution and will not support a sec. 1983 claim''); *Fields v. City of South Houston, Texas,* 922 F.2d 1183, 1189 (5th Cir. 1991) (ruling that ''[t]he United States Constitution does not require a warrant for misdemeanors not occurring in the presence of the arresting officer''); *Barry v. Fowler,* 902 F.2d 770, 772 (9th Cir. 1990) (ruling that ''[t]he requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment''); *Street v. Surdyka,* 492 F.2d 368, 372 (1974) (rejecting a constitutional challenge to a warrantless misdemeanor arrest and stating that ''[w]e do not think the fourth amendment should now be interpreted to prohibit warrantless arrests for misdemeanors committed outside an officer's presence. . . . The fourth amendment protects individuals from unfounded arrests by requiring reasonable grounds to believe a crime has been committed. The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right''); *see also Scott v. District of Columbia,* 101 F.3d 748, 754 (D.C. Cir. 1996) (noting that several circuits agree that ''the Fourth Amendment does not incorporate the common-law presence requirement for misdemeanor arrests, and that no cause of action exists under sec. 1983 unless the

arresting officer lacked probable cause to believe a crime was committed," but declining to decide the issue).[8]

Therefore, given the weight of Supreme Court authority on this issue, the overwhelming consensus of the circuits, and our similar holding in Ricci, we reject Woods' invitation to constitutionalize the framing-era common law of misdemeanor arrests and to overturn any Illinois state or municipal laws which abrogate it.

However, while the Fourth Amendment does not require a warrant for a misdemeanor arrest like the one effected here, it does require that all warrantless arrests be "reasonable." Payton, 445 U.S. at 585 (citations omitted). We have held that the "reasonableness of an arrest depends on the existence of two objective factors: First, did the arresting officers have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by state and or municipal law to effect a custodial arrest for the particular offense." *Ricci*, 116 F.3d at 290 (quoting *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989)). Woods' warrantless misdemeanor arrest was authorized by Illinois law, see 725 ILCS 5/107-2 (1998), so in order to survive summary judgment,

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8. Indeed, most of these courts upheld the constitutionality of the warrantless misdemeanor arrests at issue even though the arrests violated the relevant state law which had incorporated some variant of the common law "in the presence" rule. Since Illinois law authorizes misdemeanor arrests regardless of whether the offense occurred in the presence of the arresting officer, Woods' claim of a Fourth Amendment violation seems even weaker than the similar claims rejected by many of our sister circuits.

Woods needed to raise a genuine issue regarding whether the officers had probable cause to arrest him. On the facts presented, there can be no doubt that Woods failed to do so.

Probable cause has been defined as "facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" *Gerstein,* 420 U.S. at 111-12 (quoting *Beck v. Ohio,* 379 U.S. 89, 91 (1964)); see *United States v. Rucker,* 138 F.3d 697, 700 (7th Cir. 1998). The rule of probable cause is a "practical, nontechnical conception" that affords the "best compromise" between the interests of individual liberty and effective law enforcement. *Illinois v. Gates,* 4[illegible] U.S. 213, 231 (1983); *Gerstein,* 420 U.S. at 112 (citation omitted). Contrary to what its name might seem to suggest, probable cause "demands even less than 'probability,'" *United States v. Moore,* 215 F.3d 681, 685 (7th Cir. 2000) (quoting *United States v. Burrell,* 963 F.2d 976, 986 (7th Cir. 1992)); it "requires more than bare suspicion but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false." Id. at 686 (citation omitted).

Applying this standard, we have consistently held that an identification or a report from a single, credible victim or eyewitness can provide the basis for probable cause. *See Tangwall v. Stuckey,* 135 F.3d 510, 520 (7th Cir. 1998); *Hebron,* 18 F.3d at 422; *Gramenos v. Jewel Cos., Inc.,* 797 F.2d 432, 439 (7th Cir. 1986) (holding that a police officer had probable cause to arrest an alleged shoplifter based upon the uncorroborated report of a single security guard, and stating that "[w]hen an officer has 'received information from some person—normally the putative victim or eye witness—who it seems reasonable to believe is telling the truth,' he has probable cause") (citation omitted). In this case, the evidence showed that the arresting officers arrested Woods after Flores made out a criminal complaint against him, claiming that Woods had brandished a lead pipe and threatened to kill

Flores. Woods has offered nothing to dispute the fact that the complaint was made, nor does he offer anything to challenge either the accuracy or the credibility of Flores' description of the incident. Woods argues that the complaint as made by Flores, if true, establishes only that Woods had committed a "verbal assault," which is not a crime under Illinois law; thus, Woods argues that Flores' complaint did not give the arresting officers probable cause to believe that Woods "had committed an offense." However, as Woods notes, a offender commits an assault under Illinois law when he engages in "conduct which places another in reasonable apprehension of receiving a battery" 720 ILCS 5/12-1 (1998), and Woods offers nothing which would suggest why his wielding a lead pipe while moving towards Flores and threatening to kill him would not place Flores in reasonable apprehension of receiving a battery. Indeed, such conduct would seem to be the paradigm case of assault as defined by the Illinois Criminal Code, and as the defendants note, the very case which Woods relies upon for his claim that no crime occurred here states that "[w]ielding a tire iron while using threatening words has been held an assault." *People v. Floyd*, 663 N.E.2d 74, 76 (Ill. App. Ct. 1996) (citing *People v. Alexander*, 350 N.E.2d 144 (Ill. App. Ct. 1976)). Thus, Flores' complaint clearly related the occurrence of an assault under Illinois law.

Woods also asserts that there is no documentation showing that the officers attempted to corroborate Flores' complaint in any way, for example by speaking with Flores' supervisor, his coworkers, or the leasing company about his complaint. However, police officers have no constitutional obligation to conduct any further investigation before making an arrest if they have received information from a reasonably credible victim or eyewitness sufficient to supply probable cause. *See Gramenos*, 797 F.2d at 440. This is true even if sound police technique would have required such further investigation. See id.; *see also Spiegel v. Cortese*, 196 F.3d

717, 725 (7th Cir. 2000) ("'[t]he inquiry is whether an officer has reasonable grounds on which to act, not whether it was reasonable to conduct further investigation.'") (citation omitted). Therefore, even if the police had relied exclusively on Flores' complaint in making the arrest and had made no effort to investigate or corroborate Flores' version of the events, they would have been justified in making the arrest provided that a reasonable officer would have found Flores' complaint to be reasonably credible.

In an effort to call the credibility of Flores' complaint into question, Woods notes that Flores made out the complaint three days after the alleged assault occurred. He also points to the case report, which, in reporting Flores' description of the assault, states that Flores told the officers that he left the altercation thinking that Woods was "overreacting." As we have already noted, however, the case report submitted by Woods indicated that Flores told the police that Woods had renewed his threats against Flores through two of Flores' coworkers on the very day that Flores made out his complaint. This amounts to an apparently credible explanation for why Flores reported the offense when he did, and Woods offers absolutely nothing either to rebut this explanation or to undermine its credibility. Moreover, the bare fact that Flores left the scene of the altercation thinking that Woods was overreacting does not support any reason able inference that Flores did not take Woods' threats seriously, nor does it in any way tend to diminish the credibility of Flores' account of the incident. Finally, even if these facts did somehow diminish the credibility of the complaint that Flores made to the police, they certainly would not render it dubious enough to require the police to conduct a further investigation before arresting Woods (that is, they would not render his report incredible as a matter of law). We have found probable cause to arrest based upon uncorroborated citizen complaints which were far more questionable than was Flores' complaint. *See Spiegel*, 196 F.3d at 724-26

(finding that the defendant police officer had probable cause to arrest the plaintiff even though the victim had waited nearly a month to make a report, and even though there were inconsistencies in the victim's report as well as evidence suggesting that the victim's charge against the plaintiff was retaliatory); *Gerald M. v. J. Conneely*, 858 F.2d 378, 380-81 (7th Cir. 1988) (upholding district court's grant of summary judgment for police officer in a sec. 1983 case, reasoning that the uncorroborated complaint of a ten-year-old child that his bicycle had been stolen by two other children was sufficient to provide the officer with probable cause to arrest the accused children, even though the arresting officer knew of a long-standing grudge between the victim's family and the family of the accused children). Thus, as Woods failed to raise any material fact calling into question the officers' claim that they had probable cause to arrest him, he was unable to state a constitutional violation as required by sec. 1983, and the defendants were entitled to summary judgment.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-4069

ALBERT WOODS,

Plaintiff-Appellant,

v.

CITTY OF CHICAGO AND
CHICAGO POLICE OFFICERS
MAKOWSKI and MALANIS

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 98 CV 7092—**Charles R. Norgle** *Judge.*

[December 8, 2000]

JUDGMENT — ORAL ARGUMENT

Honorable Joel M. Flaum, Chief Judge
Honorable William J. Bauer, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-4069

ALBERT WOODS,

Plaintiff-Appellant,

v.

CITTY OF CHICAGO AND
CHICAGO POLICE OFFICERS
MAKOWSKI and MALANIS

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 98 CV 7092—**Charles R. Norgle** *Judge.*

[May 30, 2001]

ORDER

Honorable Joel M. Flaum, Chief Judge
Honorable William J. Bauer, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant, all of the judges on the original panel have voted to deny. Therefore, the petition for rehearing is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALBERT WOODS,

Plaintiff,

No. 98 CV 7092 *v.*

CITTY OF CHICAGO AND
CHICAGO POLICE OFFICERS
MAKOWSKI and MALANIS

Defendants

ORDER

CHARLES R NORGLE, SR., District Judge:

Before the court is Defendants' motion to dismiss, which the court converted to a motion for summary judgment pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the court grants the motion.

I. Background

After the court dismissed Plaintiff Albert Woods (''Woods'') original Complaint for failing to state a municipal policy, Woods amended his Complaint. In his First Amended Complaint, Woods alleges that ''[o]n July 21, 1997, a citizen walked into a Chicago police station and stated that on July 18, 1997 he had been verbally assaulted by plaintiff.'' (Am. Compl. par 5.) The Complaint further alleges that ''[t]he arresting officers did not have a warrant of any type, did not have probable cause to believe that plaintiff had committed an offense, and acted unreasonably in making the warrantless arrest.'' (Id. par. 6.) Additionally, Woods claims that the officers acted pursuant to a policy of the Chicago Police Department authorizing ''officers to make an

arrest without a warrant for any misdemeanor, even when the offense does not involve a breach of the peace and had not been committed in the officer's presence." (Am. Compl. par. 7.) Specifically, the municipal policy alleged is: "The members of the Police Department shall have power . . . to arrest or cause to be arrested, with or without process, all persons who break the peace, or are found violating any municipal ordinance or any criminal law of the state . . ." (Id. par. 7) (citing Municipal Code of the City of Chicago §5-84-230.)

Defendants moved to dismiss, presenting four arguments: (1) it was reasonable under the Fourth Amendment to arrest Woods based on the allegations of a citizen complaint; (2) the allegations of the citizen complaint established probable cause; (3) defendant police officers are entitled to qualified immunity for their actions; and (4) Woods fails to establish a causal connection between the alleged municipal policy and Woods' claimed injury. (Mot. at 5.)

Woods responded, raising, basically, two arguments. First, he states that "'verbal assault' is not an offense under Illinois law" (Resp. at 3) and, "[n]owhere in the complaint does plaintiff allege that any police officer had been informed that plaintiff had engaged in conduct which placed another in reasonable apprehension of receiving a battery." (Resp. at 5.) Thus, Woods concludes, "[u]nder clearly established Illinois law, a citizen's report of a 'verbal assault' does not establish probable cause to make an arrest." (Id.) Second, Woods argues that the municipal ordinance is unconstitutional because it "purports to abrogate the common law rule that prohibited warrantless arrest in non-felony cases unless the offense had been committed in the officer's presence and involved a breach of the peace." (Resp. at 1.) Apparently, Woods is attempting to place himself in the niche noticed by the Seventh Circuit in *Gramenos v. Jewel Cos., Inc.*, 797 F.2d 432, 441-42 (7th Cir. 1986) (stating that plaintiff "does not seek relief against the operation of the Illinois statute

authorizing misdemeanor arrests on probable cause) and *Ricci v. Arlington Hts., Ill.*, 116 F.3d 288, 290 (7th Cir. 1997) (noting that the arrestee in Gramends did not challenge the constitutionality of the Illinois statute). The court notes that Woods' attorney is the same attorney who represented the plaintiff in Ricci.

Woods argues that his Complaint alleges that the officers had no probable cause to arrest him nor did they act reasonably in arresting him based on a citizen's complaint of a "verbal assault." Indeed, as written, Woods' Complaint would survive a motion to dismiss, as there undoubtedly exists some set of factual circumstances in which a warrantless arrest based on a citizen's complaint of verbal assault would lack probable cause (such as the arresting officers knowing that the complaining citizen was lying about the assault). *Moriarty v. Lewis Funeral Dirs.* 150 F .3d 773, 777(7th Cir. 1998) (stating that a complaint may not be dismissed unless it is impossible to prevail under any set of facts that could be proved consistent with the allegations); *Albiero v. City of Kankankee,* 122 F.3d 417, 419 (7th Cir. 1997). However, when the court examined Defendants' fully-briefed Motion to Dismiss the Amended Complaint, it re-examined several exhibits that Defendants attached to their February 5, 1999 Reply to Plaintiff's Response to Defendants' January 29, 1999 Motion to Dismiss. One of those exhibits, the misdemeanor complaint, states, in pertinent part:

> Gabrial Flores complainant, now appears before the Circuit Court of Cook County and states that Albert Woods 8830 S Michigan has, on or about 18 July 97 at Cook County Ill committed the offense of Aggravated Assault in that he/she while using a deadly weapon, length of lead pipe, did without lawful authority produce weapon and came at victim yelling I'm going to kill you, which placed Gabriel Flores in reasonable apprehension of receiving a battery. In violation of 720 Illinois Compiled Statute 5/12-2

(Defendants' Feb. 5, 1999 Reply [doc.no. 15], ex. C.) Flores' signature indicates that he signed the misdemeanor complaint under oath and after he had been sworn. The misdemeanor complaint was subscribed and sworn to before P0 G Makowski, who also signed the document.

Defendants also attached the Arrest Report to their original Reply. (See Defendants' Feb. 5, 1999 Reply, Ex. A.) The arrest report describes the aggravated assault the following way:

> This is an on view arrest by 012 district tactical beat 1269C. The above subject arrested for Aggravated assault On 18 July 97 victim went to truck leasing company where offender is employed to gas up a leased truck. At that time offender got into a verbal argument with victim and produced a lead pipe and told victim I'm going to kill you. When offender started to approach victim victim got into hs truck. and fled the scene; RIO's interviewed victim who signed complainants, RIO's went to offenders place of emplyment, placed subject under arrest and advised subject of his rights which he stated he understood.

(Id.) Both arresting officers signed the Arrest Report under the line "I do solemnly, sincerely, and truly declare and affirm that the facts stated herein are accurate to the best of my knowledge." (Id.) Another officer signed the line approving probable cause. (See id.)

On February 4, 1999, Defendants' counsel sent a letter to Woods' attorney, referring to the description of the aggravated assault in the Misdemeanor Complaint. (Defendants' Feb. 5, 1999 Reply, Ex. C.) Although the court had previously granted Woods' motion to strike these exhibits (see Feb. 23, 1999 Order), it reconsidered this position. Upon re-examination of the documents, the court found no reason to proceed with lengthy discovery if the officers had indeed arrested Woods believing that he approached Flores with a

lead. pipe while threatening to kill him. Accordingly, the court converted Plaintiff's motion to dismiss into a motion for summary judgment pursuant to Federal Rule of Civil Procedure 12(b)(6) and ordered Plaintiff to respond. (See July 29, 1999 Order.) Woods responded, Defendants replied, and Woods filed a surreply.

In his Response to the court's Order, Woods brings up several issues. Regarding the procedural aspect of the case, Woods argues that: (1) the court correctly barred the exhibits from consideration when it considered Defendants' first motion to dismiss; (2) the court inappropriately converted the motion to dismiss to one of summary judgment; (3) the court's two "factual findings" in its July 29, 1999 Order are incorrect; (4) Flores' admission that Woods "over reacted" demonstrates that the officers should not have relied on Flores' account when arresting Woods; and (5) the exhibits are unauthenticated. Woods also argues that the court should deny the motion on its merits because 'verbal assault' does not establish probable cause to make an arrest, and the municipal ordinance under which the officers acted is unconstitutional.

II. Discussion

Summary judgment is permissible when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The nonmoving party cannot rest on the pleadings alone, but must identify specific facts, *see Cornfield v. Consolidated High School District No. 230,* 991 F.2d 1316, 1320 (7th Cir. 1993), that raise more than a mere scintilla of evidence to show a genuine triable issue of material fact. *See Murphy v. ITT Technical Services, Inc.,* 176 F.3d 934, 936 (7th Cir. 1999). In deciding a motion for summary judgment, the court can only consider evidence that would be admissible at trial under the Federal Rules of Evidence. *See Bombard v. Fort Wayne Newspapers, Inc.,* 92 F.3d 560, 562 (7th Cir. 1996). The court views the record and all

reasonable inferences drawn therefrom in the light most favorable to the non-moving party. Fed. R. Civ. P. 56(c), *see also, Perdomo v. Browner,* 67 F.3d 140, 144(7th Cir. 1995). means that summary judgment is not appropriate if the court must make "a choice of inferences." *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962), *see also, First Nat'l Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 280 (1968); *Wolf v. Buss (America) Inc.,* 77 F.3d 914, 922 (7th Cir. 1996). The choice between reasonable inferences from facts is a jury function. *See Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, 255 (1986). With these principles in mind, the court turns to the case at bar.

A. Prior Ruling Excluding Exhibits

Throughout his Response, Woods argues that the court should vacate its July 29, 1999 Order. That Order alerted the parties that the court would consider the exhibits it had previously stricken. Woods argues that the court correctly excluded the arrest report and similar materials from its consideration of Defendants' first motion to dismiss, and the court should do so here. (*See, e.g.,* Resp. at 2, 4.) After re-examining the exhibits, however, the court decided that addressing their contents sooner rather than later would be a more efficient use of the parties' and the court's resources. Woods offers nothing to convince the court otherwise. Thus, Plaintiff's motion to vacate the court's July 29, 1999 Order is denied.

B. Court's Conversion to Motion for Summary Judgment

Next, Woods argues that the court inappropriately converted the motion to dismiss to a motion for summary judgment. Woods contends that in order to properly respond to the motion for summary judgment, he would have to depose the officers who signed the arrest report; the citizen who filed the complaint with the police; and "the assistant corporation counsels who were involved in the settlement of *Hansen v. City of Chicago,* Case No. 98 C 105 (a case attached as an exhibit to Defendants' first Reply). The court disagrees.

Federal Rule of Civil Procedure 12(b)(6) allows a court to consider matters outside the motion to dismiss pleadings and convert the motion to dismiss to one of summary judgment. Woods offers no contrary authority.

Woods also offers no basis whatsoever for seeking leave to depose certain witnesses. Woods offers absolutely nothing to undermine the trustworthiness of the exhibits. Taken as a whole, the Misdemeanor Complaint and Arrest Report, both of which were signed under oath by Flores and the defendant officers, convince the court that the officers indeed arrested Woods on the belief that he committed an aggravated assault. Significantly, however, Woods never argues that the information contained in these reports is incorrect. Woods offers not even a scintilla of evidence that any of the documents were fraudulent, signed by mistake, or even inaccurate. And Woods never denies that he threatened to kill Flores while stepping toward him with a lead pipe in hand. Without any basis whatsoever, much less a good faith basis, the court finds conducting depositions would be a waste of time. Accordingly, the court denies Woods' motion for leave to depose certain witnesses and finds y that it properly converted the motion to dismiss into a motion for summary judgment.

C. The Court's "Factual Findings"

Next, Plaintiff takes issue with two "improvidently" made "factual findings" in the court's July 29, 1999 Order. First, Plaintiff asserts that the court made a finding that, "Wood's characterization ofthe altercation as a 'verbal assault' is grossly misleading" (July 29, 1999 Order) without "furnishing plaintiff with either notice or an opportunity to be heard." (Resp. at 4.) Plaintiff also objects to the "factual finding" that "Woods . . . ignores facts and logic in a blatent attempt to survive the motion to dismiss." (July 29, 1999 Order.) These statements, however, are not findings of fact; the court based no part of its decision on these impressions. Furthermore, Woods' Response reinforces the above

points. Plaintiffs argument that "the Court made its finding of 'grossly misleading' without furnishing plaintiff with either notice or opportunity to be heard" (Resp. at 4) leads the court to believe that Plaintiff fails to understand the purpose of the July 27, 1999 Order and of his Response.

D. Flores' Statement that Woods Overreacted

Woods next argues that because Flores stated that "after plaintiff had made this threat, Woods next argues that because Flores stated that "after plaintiff had made this threat, [complaining citizen] left thinking offender over reacting." (Resp. at 7) (citing General Offense Case Report, July 21, 1997, Resp., Ex. A), the officers had no probable cause to arrest him. The court finds this argument meritless, as the court agrees that brandishing a lead pipe and threatening to kill. someone at a gas pump is, most likely, an overreaction.

E. Exhibits are Unauthenticated

Woods also states that "[nor should plaintiff be required to accept at face value statements made in a police report that acomplaint had been personally signed. Testimony by police officers in other litigation indicates that a common practice by Chicago police officers is to sign complaints for citizens." (Resp. at 7.) Woods contends that Defendants haye failed to lay a proper foundation for the exhibits, and thus they are insufficient to support a motion for summary judgment. *See* Fed. R. Civ. P. 56 ("The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact. . . However, the court need not go further to determine that the information in the Misdemeanor Complaint and the Arrest Report is trustworthy. The court finds that these reports, sworn to under oath by the officers and Flores, are credible; they are business records kept by the police department. (*See* Fed. R. Evid. 803(6)). Additionally, Woods attaches to his Response a Chicago Police Case Report. (See Resp., Ex. 1.) The Case Report, that Woods

points to for its accuracy (*see Resp.* at 7), states: "Offender became enraged. Grabbed lead pipe-told victim to get out of truck and said 'if I get fired over this, I'm going to kill you.'" (*See* Resp., Ex. 1.) Thus, Woods admits the accuracy of the Misdemeanor Complaint and the Arrest Report. And his bare that statement police officers sometimes sign complaints for citizens (*see Resp.* at 7) is of no value whatsoever.

Moreover, the court examines these reports not for their truth, but for what the officers knew when they arrested Woods. Thus, even if Flores lied to the officers (as Woods does not assert), it has no bearing on what the officers believed when they arrested Woods. "[P]olice officers have probable cause to make a warrantless arrest when they have trustworthy information sufficient to warrant a prudent person in believing that the suspect had committed or was committing an offense." *United States v. Rucker,* 138 F.3d 697, 700 (7th Cir. 1998). "This flexible, commonsense approach does not require that the officer's belief be correct or even more likely true than false, so long as it is reasonable." *Qian v. Kautz,* 168 F.3d 949, 953 (7th Cir. 1999).

The reports' credible information shows, and Woods presents no evidence to the contrary, that the officers arrested him believing that he threatened to kill Flores with a lead pipe. The court sees no reason to prolong this case. The court gave Woods the opportunity to show why it should not accept the information in the Misdemeanor Complaint and the Arrest Report as credible. Woods utterly failed to do so and even corroborated the arrest information by providing the Case Report. Despite Woods' failure to offer any reason why the court should not accept the reports' as true, he asks the court to further authenticate the trustworthy reports. The court finds no reason to do so.

F. Reasonable Arrest

Finding nothing in Woods' Response to undermine the validity of the arrest report, the court addresses whether the arrest comports with the Fourth Amendment, that is, whether the arrest was reasonable. The court finds in the affirmative. As the Seventh Circuit noted in *Ricci,* the reasonableness of an arrest depends on two factors:

> First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by state and or municipal law to effect a custodial arrest for the particular offense. If these two factors are present, we believe that an arrest is necessarily reasonable under the fourth amendment.

116 F.3d at 290.

The court first finds that the officers had probable cause to arrest Woods because Flores reported to the officers that Woods threatened to kill him as he moved toward him with a lead pipe (and Woods offers nothing to dispute these facts). *See Gramenos,* 797 at 439 (affirming finding of probable cause based on sole eyewitness account that plaintiff shoplifted goods). Likewise, "[i]f policemen arrest a person on the basis of a private citizen's complaint that if true would justify the arrest, and they reasonably believe it is true, they cannot be held liable for a violation of the Constitution merely because it later turns out that the complaint was unfounded." *McKinney v. George,* 726 F.2d 1183, 1187 (7th Cir. 1984) (citing *Brinegar v. United States,* 338 U.S. 160, 176, (1949); *cf. Butler v. Goldblatt Bros., Inc.,* 589 F.2d 323, 325 (7th Cir. 1978)); *Rucker,* 138 F.3d at 700; *Oian,* 168 F.3d at 953. Thus, the Misdemeanor Complaint, Arrest Report, and Case Report establish that the officers had probable cause to arrest Woods.

Defendants also satisfy the second prong of a reasonable arrest, the authorization prong. "Illinois law authorizes a peace officer to arrest a person when the officer 'has

reasonable grounds to believe that the person is committing or has committed an offense.'" *Ricci,* 116 F.3d at 290 (quoting 725 ILCS 5/107-2(1)(c)). Importantly, [t]he Illinois law does not differentiate between offenses punishable by fine only and offenses punishable by a possible (or certain) term of imprisonment. *Ricci,* 116 F.3d at 290. Significantly, Woods does not argue that this Illinois law is unconstitutional. Woods argues that his actions, threatening to kill Flores while approaching him with a lead pipe, constitute a "verbal assault" which is not an offense under Illinois law. (*See Mem.* in Opp. at 2-5; Resp. at 8.) However, after given the chance to respond to the reports' description of the aggravated assault, Woods fails to convince the court that the altercation does not fall under the definition of "offense" under Illinois law. Woods' assertion that "[u]nder Illinois law, a 'verbal assault' is not a criminal offense" is simply unpersuasive. In fact, Woods' statement that there must be "conduct which places another in reasonable apprehension of receiving a battery" (Resp. at 8) is well taken; the court finds ample undisputed evidence that Flores was placed in reasonable apprehension of receiving a battery and that the officers believed as much. Thus, as the court held in *Ricci,* the officers were authorized to arrest Woods pursuant to Illinois law. Having satisfied both prongs of the reasonableness test, the court finds Woods' arrest to be reasonable and therefore constitutionally sound. Woods' argument that the Municipal Code of the City of Chicago 2-84-230 is unconstitutional need not be addressed; the officers were authorized to act under Illinois law, 725 ILCS 5/107-2(1)(c), and Woods does not contest the Illinois statute's validity.

G. Common Law Violation

Next, Woods argues that under the common law, his arrest was unlawful. Woods argues that "under the common law, an officer could make a custodial arrest for a misdemeanor only if the crime was committed in the officer's presence." *Ricci,* 116 F.3d at 290 (citing *Gramenos,* 797 F.2d at 441). However, "a suit under §1983 must show a

violation of the Constitution or laws of the United States, not just a violation of state law." *Gramenos,* 797 F.2d at 434. "'[A]n alleged violation of a state statute does not give rise to a corresponding §1983 violation, unless the right encompassed in the state statute is guaranteed under the United States Constitution.'" Id. (quoting *Moore v. Marketplace Restaurant. Inc.,* 754 F.2d 1336, 1349 (7th Cir. 1985)). Although *Gramenos* is silent about whether a suit under §1983 can survive if it demonstrates a violation of the common, as opposed to state, law, the court finds that, as in *Gramenos,* a plaintiff must allege a violation of a constitutional right in order to support a §1983 claim. Simply put, a claim of a violation of common law does not equate to a claim of a Constitutional violation. Accordingly, having found Woods' arrest constitutional, the court need not address whether the arrest violated the common law. But it will.

The court finds *Ricci* informative on this point. *See* 116 F.3d 288. In that case, the plaintiff sued the Village of Arlington Heights, Illinois for violating that village's fine-only ordinance that precluded operation of a business without a license. *See id.* at 289. The plaintiff argued that the common law allowed arrest for a misdemeanor committed in an officer's presence only if that crime constituted a breach of the peace. *See Ricci,* 116 F.3d at 291. The *Ricci* court, however, declined to utilize the plaintiffs proffered bright-line test; stating, "the common law rule has been relaxed to include arrests for offenses other than breaches of the peace." Id. (citing *Fisher v. Wash. Metro. Area Transit Auth.,* 690 F.2d. 1133 (4th Cir. 1982) (refusing to find unconstitutional an arrest for violation of a fine-only ordinance prohibiting eating on trains); *Higbee v. City of San Diego,* 911 F.2d 377 (9th Cir. 1990) (finding constitutionally permissible the detention for processing of misdemeanor arrestees who were operating a "peep show" in violation of local ordinance, even though officers could have issued field

release citations under city policy)). The court then found that:

> the rationale for warrantless arrests for breaches of the peace was to promptly suppress breaches of the peace. Here the arrest served a similar purpose. The arrest prevented Ricci from continuing to violate a law he had been admittedly violating for some time.

Ricci, 116 F.3d at 291. The court concluded that the arrest was reasonable under the Fourth Amendment and that the officers were entitled to arrest a violator of the municipal ordinance. *See id.*

Likewise, the arrest in the case at bar, satisfies the relaxed common law rule. *See Ricci,* 116 F.3d at 291. Taking into custody a person who had threatened to kill someone while brandishing a lead pipe serves a purpose similar to promptly suppressing breaches of the peace and preventing a business owner from continuing to violate a law. *See id.* Thus, Woods' argument that his arrest violated the common law fails.

Having found that Woods fails to establish a constitutional violation, the court declines to address the arguments that defendant police officers are entitled to qualified immunity and that Woods fails to establish a causal connection between the alleged municipal policy and his claimed injury.

III. Conclusion

For the reasons stated above, the court grants Defendants' motion.

IT IS SO ORDERED.

ENTER:

/s/ Charles Ronald Norgle, Sr.
United States District Judge

Dated: November 4, 1999